STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeasl
O'Connell, PJ, Saad and Talbot, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

GERACER TAYLOR
Defendant-Appellant

No. ~~134207~~ 134206

L.C. No. 04-3893-FC
COA No. 265778

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Statements are not testimonial if information is sought to deal with an ongoing emergency. The statement made by the deceased identifying his assailant was made while the smell of gunpowder was still in the room "bits of fluff" from the bedding were in the air. Was the statement an "emergency" statement; further, under the circumstances did it constitute a dying declaration, and are dying declarations without the Sixth Amendment whether testimonial or nontestimonial?

Amicus answers: "YES"

Statement of Facts

Amicus adopts the statement of facts of the People of the State of Michigan.

Argument

I.

Statements are not testimonial if information is sought to deal with an ongoing emergency. The statement made by the deceased identifying his assailant was made while the smell of gunpowder was still in the room "bits of fluff" from the bedding were in the air. The statement was an "emergency" statement; further, under the circumstances here it constituted a dying declaration, and dying declarations are without the Sixth Amendment whether testimonial or nontestimonial.

A. Introduction

(1) Salient Facts

The police arrived at the location of the shooting here almost immediately after it occurred. The murder victim, Lasater, was found "hunched over holding himself . . . moaning real loud." There were still "bits of fluff from the blankets and pillow still floating in the air," and the bedroom smelled of gunpowder. Two other persons—Jackson and Peters—were in house, but entry had to be forced. Officer Kriss, who concluded form Lasater's wounds that it was unlikely that Lasater would survive, asked him for a description of the person who shot him. After some apparent initial reluctance, Lasater said "[T]hat n*****, Booger, shot me." The officer told Lasater that Lasater was not going "to make it," pressing for Booger's real name, and Lasater repeated"[T]hat n*****, Booger, shot me." (105a). A second officer spoke to the victim after emergency personnel arrived, told him that the "the fire department didn't think he was going to make it," and asked who shot him; Lasater answered "Booger shot me."

The medical examiner, Dr. Spitz, testified:

> Yes. It would be my opinion based on review of all the evidence including the autopsy, that the assailant in this case would have – his upper body to some extent would have entered the window to allow for, one, visualization of the target to assure accuracy; two, to allow the muzzle-to-target distance to be in the range that is depicted by these wounds which is three to four feet; and three, the trajectory of the wound is from primarily right to left of the chest wound and the abdominal wound. In order to get right to left trajectory the gun would have to be perpendicular to the victim who was on the bed and situated actually more toward the head of the bed, and making it more difficult unless you are in the window to actually hit your target. (99b-100b).

At the end of direct examination, Dr. Spitz reiterated that "in order to account for a three- to four-foot range, the gun has to be inside the window" and "in order for the gun to be inside the window, the individual holding the gun also has to be inside the window." (101b).

(2) Approach of Amicus

This court has directed parties and any interested amici to brief "(1) whether Lasater's identifications were testimonial or non-testimonial under *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); (2) whether, if the statements were testimonial, they constitute dying declarations; and (3) "whether the Sixth Amendment incorporates an exception for testimonial dying declarations."[1] The Court of Appeals held that the statements were nontestimonial, but that in any event the constituted dying declarations, which it found to be, under *Crawford v Washington*,[2] an exception to the general prohibition of introduction of testimonial statements from uncross-examined declarants. Amicus agrees:

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[1] *People v. Taylor*, 480 Mich 946 (2007).

[2] *Crawford v Washington*, 541 US 36, 124 S Ct 1354, 158 L.Ed.2d 177 (2004).

- The statements were not testimonial under *Davis*;
- Dying declarations may, depending on the circumstances, be nontestimonial or testimonial, and the statements here, even if testimonial, constituted dying declarations;
- Dying declarations are admissible under the Sixth Amendment whether testimonial or nontestimonial;
- The statements here are also admissible under the doctrine of forfeiture by wrongdoing.[3]

B. The Statements Here Were Nontestimonial[4]

Though the United States Supreme Court has yet to lay out a comprehensive definition of the term "testimonial" for Confrontation Clause purposes—and may never do so—in the *Davis* case the Court set out certain boundaries in several commonly-occurring situations. The opinion presents two factual scenarios, being a combined opinion on two cases, the first involving a 911 call, the second officers arriving at a scene. In *Davis*, a victim of domestic violence call a 911 operator, who ascertained from her that she had been assaulted by her former boyfriend, Davis, who had just fled the scene. The victim did not appear for trial, and the 911 call was admitted over objection. In the companion case, *Hammon*, when police responded to a reported domestic disturbance the victim first told them everything was fine, but allowed them to enter the home. The police separated the victim and her husband, and the victim told an officer her husband had struck her, and completed and

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[3] This was not the basis of affirmance by the Court of Appeals, and is not the principal contention of amicus, but an alternative ground. And the ruling of the trial court may be sustained on any ground that supports affirmance, whether argued below or not. See e.g. *People v. Lyon,* 227 Mich App. 599, 612-613 (1998); see also *Clark v. Arizona*, 548 US 735, 126 S.Ct. 2709, 2741, Ed 2d 842 (2006).

[4] The statements to the second officer, made after emergency medical personnel arrived, might present a closer question, but are of no moment if the initial statements identifying the assailant are nontestimonial—and they are.

signed a "battery affidavit." She did not appear for trial and the affidavit and testimony from the officer who took her statement were admitted.

The Court's holding on "testimonial" and the use of hearsay taken by government agents from unavailable declarants was:

> Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: *Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*[5]

Under this test the 911 call was held admissible, but the statements to the officer in the second case (and the affidavit) held not.

Critically, the Court also held that"Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, ..., we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "officers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."..... *Such exigencies may **often** mean that "initial inquiries" produce nontestimonial statements.*"[6]

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[5] *Crawford*, 126 S Ct at 2273-2274 (emphasis supplied).

[6] *Crawford*, 126 S Ct at 2279.

Here, applying this test, the Court of Appeals held—affirming the conclusion of the trial court—that "When, as here, police officers arrive at the crime scene immediately after a shooting, with a number of people in the house, and where the victim-who is clearly dying of multiple gunshot wounds-identifies his assailant, the identifying statements given to the police are nontestimonial under *Crawford.*"[7] This is correct. In *Davis* the statements to the 911 operator were found to be nontestimonial:

> the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. *That is true even of the operator's effort to establish the identity of the assailant*, so that the dispatched officers might know whether they would be encountering a violent felon. See, *e.g., Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.[8]

Here, the officers discovered a man shot multiple times, with the smell of gunpowder still in the air, "fluff" from the bedding was still floating in the air, and, though there were two other people in the house, entry had to be forced. For all the police knew the perpetrator of the attack could have been one of the two men they discovered in the house, or someone lurking elsewhere in the house or about the grounds. And, as with *Davis*, the difference in the formality of the "interview" when compared to that in *Crawford* (or even *Hammon*) is striking. As the Court said in *Davis*, "officers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat

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[7] *People v. Taylor*, 275 Mich.App. 177, 182 (2007).

[8] *Davis*, at 126 S Ct 2276 - 2277 (emphasis supplied).

to their own safety, and possible danger to the potential victim."... *Such exigencies may **often** mean that "initial inquiries" produce nontestimonial statements.*" This is such a case. The Court of Appeals did not err in affirming the conclusion of the trial court that the statement of the deceased identifying his attacker was not testimonial.[9]

C. The Statements Here Were Dying Declarations, and Even Testimonial Dying Declarations Fall Without the Confrontation Clause

Amicus will not belabor the points made by the parties and other amici here. The cases are almost uniform in finding that, as strongly suggested by *Crawford*, even testimonial dying declarations are without the Confrontation Clause as a matter of historical exception. Indeed, even defendant and his amici virtually concede the point, arguing not that testimonial dying declarations violate the Confrontation Clause, but that the dying-declaration exception requirements were not met here, the argument being that it has not been shown that the deceased spoke with "personal knowledge." But for the reasons well-stated by the People (and see Dr. Spitz's testimony), there was ample evidence for the trial court to conclude by a preponderance of the evidence that this requirement had been met,[10] so as to allow the jury to consider the testimony.

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[9] The conclusion to the contrary of one of defendant's amici, Professor Friedman, is too clever by half. He concludes that "trying to ascertain the identity of the assailant served no medical purpose" (neither did it in *Davis*); that "nor was this a situation in which the officer tried to ascertain the identity of the assailant so that he could prevent further immediate violence" (neither was it in *Davis*); that "there was no suggestion that he thought the shooter had remained in the immediate vicinity; he did not suspect the shooter was among the other people in the house, who were *sleeping"* (nor was there any such suggestion in *Davis).* The individuals, or at least one of them, might have been feigning sleep, and, for all the officer knew, the perpetrator *could* have "remained in the immediate vicinity." The point of the emergency is precisely that the police *will not know* these things on arrival, and attempts to ascertain them results in nontestimonial statements.

[10] See MRE 104(a); *People v. Hendrickson,* 459 Mich. 229, 242-243 (1998) (Boyle, J., concurring).

D. The Statements Were Admissible Under the Forfeiture By Wrongdoing Doctrine

Though amicus finds much to disagree with in Professor Friedman's thoughtful and scholarly approach to the Confrontation Clause under *Crawford*,[11] amicus agrees with Professor Friedman that the forfeiture by wrongdoing doctrine encompasses dying declarations in any event (see attached). Though Professor Friedman takes the view here that there the statements here remain inadmissible because of a lack of personal knowledge on the part of the declarant, for the reasons previously stated, and detailed by the People, amicus disagrees. But it is true that the Supreme Court has granted certiorari on the question in *Giles v California*,[12] and thus it might be advisable for this court to hold this case in abeyance pending decision of that case by the Supreme Court.

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[11] For example, to define testimonial statements as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" is both under and over-inclusive; it is also contrary to human experience, and essentially useless in the inquiry, if not downright misleading. To the extent a person interviewed by the police has any expectations at all, it is that their statements to the police might reveal them as witnesses and thus persons to be *called at trial*. But it is rather fanciful to believe that those interviewed have some belief that their *statements* given at *that* time might be admitted at trial.

[12] *Giles v California*, __US__, 128 S Ct 978 (2008).

Relief

Wherefore, amicus submits that the Court of Appeals should be affirmed.

Respectfully submitted,

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